IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	:	
	:	Case No. 1505017517
v.	:	In and For Kent County
	:	
DAVID W. DALE,	:	
	:	
Defendant.	:	

Submitted: January 26, 2016
Decided: February 11, 2016

ORDER

Upon Defendant's Motion to Suppress.
Granted.

D. Benjamin Snyder, Esquire of Department of Justice, Dover, Delaware; attorney for the State of Delaware.

John R. Garey, Esquire of John R. Garey, P.A., Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

Before the Court is Defendant David Dale's ("Dale") motion to suppress any evidence obtained as the result of his arrest for Driving Under the Influence ("DUI"). Dale argues that Sergeant Joseph Perna ("Sgt. Perna") of the Harrington Police Department lacked probable cause to make the arrest. For the following reasons, the Defendant's motion to suppress is *granted*.

FACTS AND PROCEDURAL HISTORY

On May 23, 2015, at approximately 5:33 a.m., Sgt. Perna stopped a vehicle driven by Dale for traveling 51 mph in a 35 mph zone. Sgt. Perna did not observe any erratic or aggressive driving. Dale was pulling into the Liberty Plaza parking lot when Sgt. Perna activated his emergency lighting. Dale stopped his vehicle approximately fifty to seventy five yards into the parking lot. It was just starting to get light outside and Sgt. Perna had need of his flashlight during the stop. Upon contact, Sgt. Perna noticed a moderate odor of alcohol coming from inside the vehicle, bloodshot eyes, and that Dale was wearing a sweatshirt that was inside-out and backwards. Sgt. Perna testified that Dale's speech was fair and his face color appeared normal. When Sgt. Perna asked Dale if he had been drinking, Dale initially replied that he had not been drinking but later stated he had been. Sgt. Perna asked for Dale's registration, driver's license, and proof of insurance, which Dale produced.

Sgt. Perna then had Dale exit the vehicle and perform the alphabet test. When asked to start with the letter C and stop with the letter P, Dale simply stated C and P. Sgt. Perna next asked Dale to count backwards from 75 to 55, and Dale properly completed the task. Sgt. Perna then performed a Horizontal Gaze Nystagmus

("HGN") test. Because of the poor lighting conditions, Sgt. Perna needed to use his flashlight to complete the test. The test checks for three clues in each eye, for a total of six clues, that would indicate the person being tested has alcohol in their system. Sgt. Perna testified that a normal HGN test took approximately ninety seconds to complete. The elapsed time from the beginning to the end of Dale's HGN test was fifty-five seconds, and all six clues were detected. Sgt. Perna would have next asked Dale to perform the walk and turn and the one-leg stand test, but Dale stated that he had injuries that would prevent him from performing the test.

Sgt. Perna next administered a portable breathalyzer test ("PBT"). When asked if the PBT had been administered in accordance with standard operating procedures, Sgt. Perna testified that he believed he may have administered the test a minute or two before the required fifteen minute wait period. The complete stop was captured on a mobile video recorder ("MVR"), and when the recording was played at the January 6, 2015 suppression hearing, it showed the PBT was administered approximately eight minutes into the video. Sgt. Perna felt that waiting the required fifteen minute observation period would have created an officer safety issue because Dale had an unknown amount of alcohol in his system. Prior to administering the test, Sgt. Perna asked Dale how many zeros he saw on the meter, and Dale replied zero. The meter was displaying three zeros. After performing the test on Dale, the meter showed a reading of .174. Sgt. Perna asked Dale to read the result, and Dale read the result as 1.74. Dale was then placed under arrest for DUI and transported to the Harrington Police Department where he submitted to an Intoxilyzer test which revealed a BAC

of .20. On November 18, 2015, Dale filed this motion to suppress evidence from the arrest.

STANDARD OF REVIEW

The Delaware Supreme Court has held that "any evidence recovered or derived from an illegal search and seizure" must be excluded from evidence.[1] Once a motion to suppress has been filed, the State bears the burden of proving by a preponderance of the evidence "that the challenged police conduct comported with the rights guaranteed [to the defendant] by the United States Constitution, the Delaware Constitution and Delaware statutory law."[2] Thus, the State bears the burden of establishing that there was probable cause to believe the defendant was driving under the influence of alcohol before the performance of the intoxilyzer test.[3] Probable cause exists "when the officer possesses information which would warrant a reasonable man in believing that a crime has been committed."[4] The finding of probable cause does not require proof beyond a reasonable doubt, or even that the defendant's guilt is more likely than not. Probable cause only requires that the arresting officers "present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime."[5]

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[1] *Jones v. State*, 745 A.2d 856, 872-73 (Del. 1999).

[2] *State v. Kang*, 2001 WL 1729126, at *3 (Del. Super. Nov. 30, 2001).

[3] *Bease v. State*, 884 A.2d 495, 498 (Del. 2005).

[4] *State v. Betts*, 2015 WL 2066602, at *1 (Del. Super. Apr. 1, 2015).

[5] *Id.* at *5.

DISCUSSION

An automobile stop "must be justified, at its inception, by reasonable suspicion of criminal activity, and the scope of the stop must be reasonably related to the stop's initial purpose."[6] The decision to stop an automobile is generally considered reasonable "when the police have probable cause to believe that a traffic violation has occurred."[7] Continuation of the stop beyond the initial purpose of the stop requires an officer have reasonable and articulable suspicion based upon "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion."[8] An officer's reasonable and articulable suspicion that a defendant may have been driving while impaired will justify the continued detention necessary to conduct field sobriety testing.

Factors justifying an officer's reasonable and articulable suspicion are included in the totality of the circumstances justifying a finding of probable cause. Thus, a sufficient performance on the field sobriety tests will not negate probable cause if probable cause existed prior to the tests.[9] In *Lefebvre v. State*, the Supreme Court of Delaware held that factors giving rise to reasonable suspicion were not to be segmented from factors derived from the administration of field sobriety tests.[10] In

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[6] *State v. Lewis*, 2013 WL 2297031, at *2 (Del. Super. May 20, 2013) (citing *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001)).

[7] *McDonald v. State*, 947 A.2d 1073, 1077 (Del. 2008).

[8] *State v. Miliany-Ojeda*, 2004 WL 343965, at *3 (Del. Super. Feb. 18, 2004).

[9] *Lefebvre v. State*, 19 A.3d 287, 295 (Del. 2011).

[10] *Id.*

a 3-2 decision, the Court upheld a lower court finding that there was probable cause for an arrest even though the defendant had fair speech and had passed the field sobriety tests which included the alphabet, counting, and finger dexterity, one-leg stand, and walk and turn tests, and had exited her car without losing her balance.[11] Prior to the administration of the field tests, the defendant had been pulled over for a traffic offense, emitted a strong odor of alcohol, had a flushed face, was somewhat argumentative, admitted to drinking an hour and a half prior to the stop, and, when asked to perform the one-leg stand test, stated that "I'm not that good at this sober."[12] The majority of the Court found that factors discovered prior to the administration of the field tests outweighed the defendant's passing performance on "the *properly* administered field test."[13]

National Highway Traffic Safety Administration ("NHTSA") has developed standardized methods to be used when evaluating motorists who are suspected of DUI. Notwithstanding that field sobriety tests must be administered in strict compliance with standardized procedures, "no Court in this jurisdiction ha[s] concluded that a failure to strictly comply with NHTSA invalidates the test."[14] "The Court's role is to take note of the deficiencies in the administration of the sobriety test when giving weight and value to the tests performed."[15] Likewise, although pre-exit

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[11] *Id.* at 290-292.

[12] *Id.* at 292.

[13] *Id.* at 295.

[14] *State v. Lanouette*, 2012 WL 4857820, at *8 (Del. Com. Pl. Aug. 27, 2012).

[15] *Id.*

tests should be conducted before a driver is removed from the vehicle, this Court has not previously found that "the deficiency of asking a Defendant to perform the tests outside the vehicle as opposed to inside the vehicle are enough to disqualify the results from a probable cause determination."[16]

In the case *sub judice*, Sgt. Perna testified that upon contact with Dale he noted a moderate odor of alcohol coming from inside the vehicle, bloodshot eyes, a sweatshirt that was being worn inside out and backwards, and that Dale eventually admitted to drinking earlier. Sgt. Perna also testified that Dale was cooperative, his speech was fair, and his face color appeared normal. Based upon the odor of alcohol, bloodshot eyes, a sweatshirt being worn inside out and backwards, and the admission to drinking earlier, Sgt. Perna had reasonable and articulable suspicion that Dale was driving while under the influence of alcohol. Therefore, the extension of the stop in order to conduct field sobriety testing was proper.

Sgt. Perna asked Dale to exit the vehicle before beginning the field sobriety tests. It was after Dale exited the vehicle that Sgt. Perna asked Dale to perform two pre-exit tests, the alphabet test and number counting test. When asked to say the alphabet starting with C and ending with P, Dale simply stated C and P. Dale either misunderstood the instructions or failed the alphabet test. Dale completed the number counting test with no issue.

Sgt. Perna then conducted an HGN test. The HGN test was conducted in an unlit area with the use of a flashlight. Although Sgt. Perna was unable to state the

[16] *State v. Hudgins*, 2015 WL 511422, at *3 (Del. Super. Jan. 16, 2015).

scientific rationale behind the HGN test, he did testify that the HGN test should normally take approximately ninety seconds to complete. The HGN test performed on Dale was completed within 55 seconds. The implication is that if a "normal"HGN test takes ninety seconds to complete, then the test performed on Dale was not normal. This does not mean that the Court is required to disregard the HGN test, but that the test was not normal does go to the weight of the evidence. However, this was not a minor deviation. The test was conducted in approximately 60% of the time required to conduct a normal test. Because the test was conducted significantly faster than Sgt. Perna testified it should have been conducted, and was conducted in poor lighting conditions, the Court will disregard the HGN test in this instance.

Sgt. Perna did not ask Dale to perform the walk and turn and the one leg stand test because Dale stated that he had injuries that would prevent him from performing the test. Sgt. Perna next administered the PBT. Standard procedure for administering the PBT requires a fifteen minute observation period before the test is performed. Sgt. Perna initially testified that the observation time was thirteen minutes. This testimony was presumptively based on the fact that the recording from the MVR was thirteen minutes long. The recording showed that the PBT was actually administered eight minutes into the recording. This reduced the required observation period by almost fifty percent. Although failure to strictly adhere to NHTSA requirements does not necessarily invalidate the test, the deviation from the fifteen minute requirement in this case is so severe that the Court will not consider the PBT results.

Prior to administering the field sobriety tests, Sgt. Perna noticed Dale had

bloodshot eyes. Bloodshot eyes can "result from a variety of non-criminal circumstances, such as tiredness, allergies, or just rubbing the eyes."[17] Although bloodshot eyes combined with an odor of alcohol can give rise to reasonable suspicion, the probative value of this factor is reduced when one considers the early morning stop and poor lighting conditions. Sgt. Perna also noted that Dale had his sweatshirt on inside out and backwards, but failed to ask for a reason.

Based on the foregoing, the only evidence from the field sobriety test that would support probable cause would be Dale's failure to properly perform the alphabet test. Even considering factors noted before administering the field sobriety tests such as Dale's bloodshot eyes at 5:30 a.m., that his shirt was on inside out and backwards, and a moderate smell of alcohol, there is insufficient evidence to support a finding of probable cause. The lack of probable cause becomes more evident when considering Sgt. Perna's testimony that Dale did not engage in aggressive or erratic driving, his speech was fair, his face color appeared normal, he did not fumble when retrieving is license, registration, and proof of insurance, and he was cooperative. Although close, this Court does not find the State has presented facts which suggest, when viewed under the totality of the circumstances, that there is a fair probability that Dale has committed a crime.

[17] *State v. Heath*, 929 A.2d 390, 409 (Del. Super. 2006).

CONCLUSION

For the foregoing reasons, Defendant David W. Dale's motion to suppress evidence resulting in his arrest is **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: D. Benjamin Snyder, Esquire
John R. Garey, Esquire